

IN THE

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Supreme Court of the United States F. DAVIS, CLERK

OCTOBER TERM, 1968

No. 488

MRS. DORIS DANIEL and MRS. ROSALYN KYLES,
Petitioners,

—v.—

EUELL PAUL, JR., Individually and as Owner, Operator
or Manager of Lake Nixon Club,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

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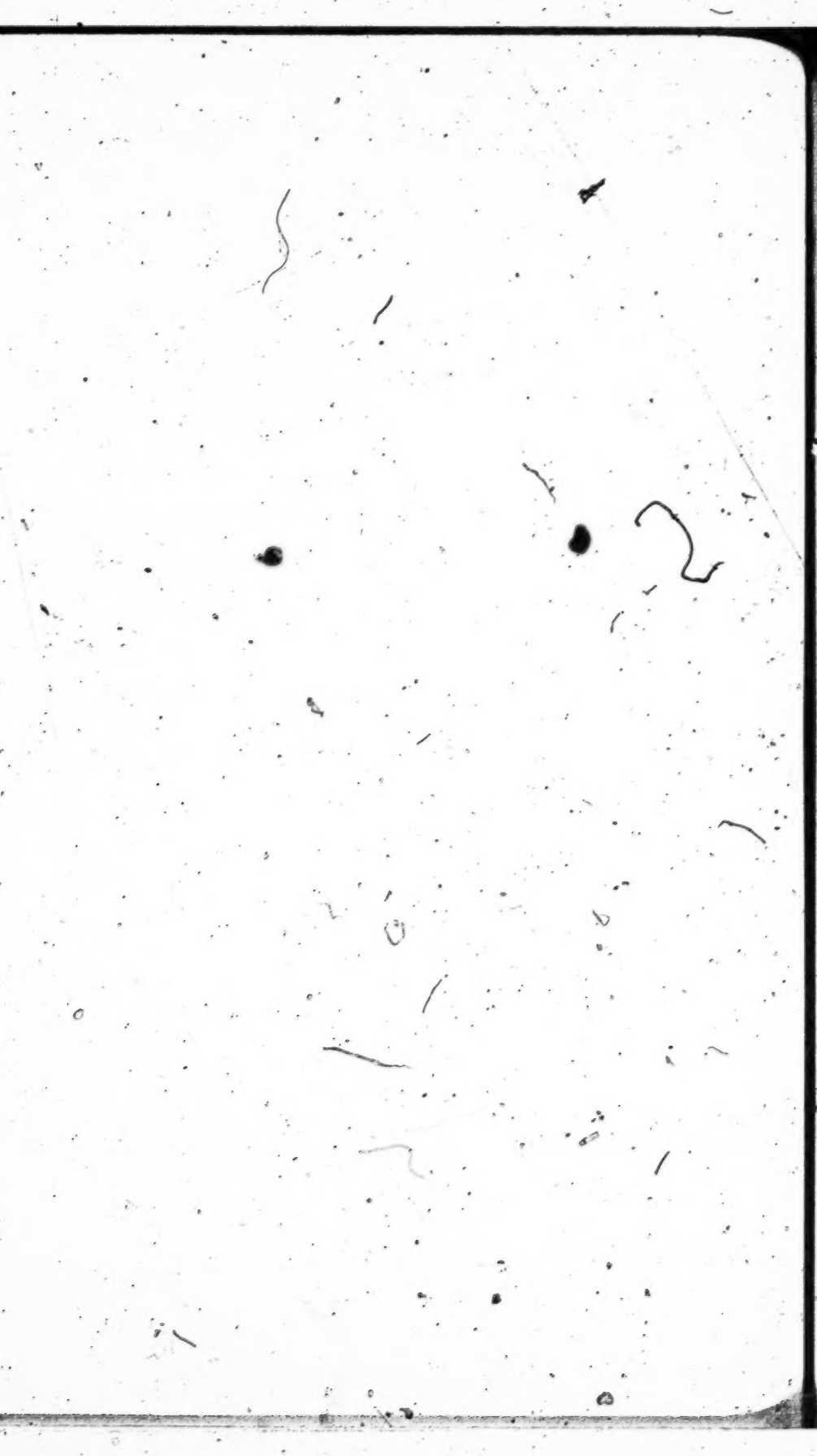
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Jurisdiction

The judgment of the United States Court of Appeals for the Eighth Circuit was rendered May 3, 1968. A petition for a rehearing *en banc* was denied on June 10, 1968. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1254(1).

Questions Presented

1. Lake Nixon Club is a privately owned and operated recreational area open to the white public in general. Lake Nixon has facilities for swimming, boating, picnicking, sunbathing, and miniature golf. On the premises is a snack bar principally engaged in selling food for consumption on the premises which offers to serve interstate travelers and which serves food, a substantial portion of which has moved in commerce.

a) Is the snack bar a covered establishment within the contemplation of Title II of the Civil Rights Act of 1964, and if so, does this bring the entire recreational area within the coverage of Title II?

b) Is the Lake Nixon Club a place of entertainment within the scope of Title II?

2. Petitioners are denied admission to Lake Nixon Club solely because they are Negroes. Have petitioners been denied the same right to make and enforce contracts and have an interest in property, as is enjoyed by white citizens, in violation of the Thirteenth Amendment and an Act of Congress, 42 U. S. C. §§1981, 1982?

Constitutional and Statutory Provisions Involved

This case involves the Commerce Clause, Art. 1, §8, cl. 3, and the Thirteenth and Fourteenth Amendments of the Constitution of the United States.

This case also involves the following United States statutes:

42 U. S. C. §1981:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U. S. C. §1982:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U. S. C. §2000a(b):

Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

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**PETITION FOR WRIT OF CERTIORARI TO THE
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FOR THE EIGHTH CIRCUIT**

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled action on May 3, 1968, rehearing denied June 10, 1968.

Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit and the dissenting opinion of Judge Heaney are reported at 395 F. 2d 118, 127. They are set forth in the appendix, pp. 16a-40a. The opinion of the United States District Court for the Eastern District of Arkansas is reported at 263 F. Supp. 412 and is set forth in the appendix, pp. 1a-14a.

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

42 U. S. C. §2000a(c);

The operations of an establishment affect commerce within the meaning of this subchapter if . . . (2) in the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents, films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) of this section, it is physically located within the premises of, or there is physically located within its premises, an

establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia; or between points in the same State but through any other State or the District of Columbia or a foreign country.

Statement

On July 18, 1966, petitioners, Mrs. Doris Daniel and Mrs. Rosalyn Kyles, Negro citizens of the City of Little Rock, Pulaski County, Arkansas, instituted a class action in the United States District Court for the Eastern District of Arkansas against Euell Paul, Jr., individually and as owner of Lake Nixon Club, Pulaski County, Arkansas (R. 1, 3, 4).¹ The petitioners claimed that the Lake Nixon Club was depriving them, and Negro citizens similarly situated, of rights, privileges and immunities secured by (a) the Fourteenth Amendment to the Constitution of the United States; (b) the Commerce Clause of the Constitution; (c) Title II of the Civil Rights Act of 1964 (42 U. S. C. §2000a), providing for injunctive relief against discrimination in places of public accommodation; and (d) 42 U. S. C. §1981, providing for the equal rights of citizens and all persons within the jurisdiction of the United States (R. 3). The complaint alleged that the Lake Nixon Club pursues a

¹ The certified record consists of one volume with district court proceedings independently paginated from the Eighth Circuit proceedings. All citations in the text are to the district court proceedings.

policy of racial discrimination in the operation of its facilities, services and accommodations; petitioners prayed for injunctive relief (R. 3).

On August 3, 1966, Mr. Euell Paul, Jr., answered the complaint (R. 1). At the trial, Mrs. Paul was made a party defendant without objection (R. 42; 263 F. Supp. at 414). After a trial without a jury, the District Court, on February 1, 1967, held that the Lake Nixon Club is not a place of public accommodation within the contemplation of the Civil Rights Act and that its operations do not affect commerce, and dismissed the complaint with prejudice (R. 61, 63; 263 F. Supp. at 420). The petitioners filed notice of appeal to the Court of Appeals for the Eighth Circuit on March 2, 1967 (R. 63).

The United States Court of Appeals for the Eighth affirmed the judgment of the District Court on May 3, 1968, Judge Heaney dissenting, 395 F. 2d 118, 127. On June 10, 1968, petitioners' petition for a rehearing was denied.

Lake Nixon Club is a recreational area comprising 232 acres (R. 43) and located about 12 miles west of Little Rock, Arkansas (Appellee's Brief in the Court of Appeals, 1). There is a State highway located 5 miles north of Lake Nixon and a U. S. highway located 5 miles to the south (Appellee's Brief in the Court of Appeals, 2).

During each season, approximately 100,000 people avail themselves of Lake Nixon's swimming, picnicking, boating, sun-bathing, and miniature golf (R. 44, 54; 263 F. Supp. at 416). The exact number of members is unknown and the Pauls do not maintain a membership list (R. 56, 263 F. Supp. at 417).

At Lake Nixon there is a snack bar which sells hamburgers, hot dogs, milk and sodas for consumption on the premises (R. 12, 30, 35; 263 F. Supp. at 416). The snack bar is operated by Mrs. Paul's sister under an oral agreement whereby the parties share the profits from the snack bar (R. 32). In 1966 the gross receipts from food sales accounted for almost 23% of the total gross receipts (\$10,468.95 out of a total of \$46,326.00) (R. 12, 63).

The equipment of Lake Nixon includes two juke boxes manufactured out of Arkansas (R. 55; 263 F. Supp. at 417); 15 aluminum paddle boats leased from an Oklahoma company, and a surfboard or yak purchased from the same company (R. 28, 29). The rental cost of the paddle boats is based on a percentage of the profits realized from their rental to patrons of Lake Nixon (R. 28).

Lake Nixon Club was advertised in the following media: (a) once in 1966 in *Little Rock Today*, a monthly publication distributed free of charge by Little Rock's leading hotels, chambers of commerce, motels and restaurants to their guests, newcomers and tourists; (b) once in 1966 in the Little Rock Air Force Base publication; (c) and three days each week from May through September, 1966, over radio station KALO (R. 11; Petition for Rehearing En Banc, 5; 263 F. Supp. at 417-418). A typical radio announcement stated:

"Attention all members of Lake Nixon. In answer to your requests, Mr. Paul is happy to announce the Saturday night dances will be continued . . . Lake Nixon continues their policy of offering you year-round entertainment. The Villagers play for the big dance Saturday night and, of course, there's the jam session Sunday afternoon . . . also swimming, boating, and

miniature golf . . . " 395 F. 2d at 130, n. 10 (dissenting opinion).

On July 10, 1966, the petitioners sought admission to Lake Nixon (R. 38, 39). The District Court found that they were refused admission because they are Negroes (R. 58; 263 F. Supp. at 418). The District Court also found that Lake Nixon Club is not a private club within the contemplation of the 1964 Civil Rights Act, but is a facility open to the white public in general (R. 58; 263 F. Supp. at 418).

Jurisdiction of the District Court

Jurisdiction of the United States District Court for the Eastern District of Arkansas was based on 28 U. S. C. §§1343(3) and 1343(4).

Reasons for Granting the Writ

I.

Certiorari Should Be Granted (a) to Resolve a Conflict Between the Courts of Appeals for the Eighth and Fifth Circuits as to Establishments Covered by §201 (b) (4) and (c) (4) of the 1964 Civil Rights Act, and (b) to Resolve a Conflict Between These Same Courts as to the Meaning of "Place of Entertainment" in §201 (b) (3) and (c) (3) of the Same Act.

Lake Nixon Club is a public accommodation within the coverage of Title II of the Civil Rights Act of 1964 on both of the following grounds:

A) within the premises of Lake Nixon is physically located a lunch counter principally engaged in selling food

for consumption on the premises which offers to serve interstate travelers and which serves food, a substantial portion of which has moved in commerce, and this lunch counter serves all patrons of Lake Nixon. 42 U. S. C. §2000a(b)(4) and (c)(4).

B) Lake Nixon is a place of entertainment which customarily presents sources of entertainment which move in commerce. 42 U. S. C. §2000a(b)(3) and (c)(3).

A. Title II of the 1964 Civil Rights Act Applies to the Whole of Lake Nixon Because of Its Lunch Counter's Operations

It is not disputed that the lunch counter at Lake Nixon is principally engaged in selling food for consumption on the premises. Coverage of the snack bar under Title II thus depends on whether it offers to serve interstate travelers or serves food or other products a substantial portion of which has moved in commerce.

The Court of Appeals found a total lack of proof of any offer to serve interstate travelers, 395 F. 2d at 127. The District Court did not specifically find whether the Pauls offered to serve interstate travelers. The District Court found no evidence that Lake Nixon "ever tried to attract interstate travelers *as such*" (R. 57; 263 F. Supp. at 418) (emphasis added).

Both Courts erred in failing to find that Lake Nixon offers to serve interstate travelers. The District Court specifically found that Lake Nixon is open to the white public in general (R. 58; 263 F. Supp. at 418) and concluded that "it is probably true that some out-of-state people" have used the facilities of Lake Nixon (R. 57; 263 F. Supp. at 418). An offer to serve the general public, under circumstances which make it reasonable to assume

that some interstate travelers will accept the offer, is an offer to serve interstate travelers, where there is no inquiry made as to the customers' origin. *Haimm v. Rock Hill*, 379 U. S. 306 (1964); *Miller v. Amusement Enterprises, Inc.*, 394 F. 2d 342 (5th Cir. en banc, 1968); *Evans v. Laurel Links, Inc.*, 261 F. Supp. 474 (E. D. Va. 1966); *Bolton v. State*, 220 Ga. 632, 140 S. E. 2d 866 (1965).

Circumstances which make it reasonable to assume that some interstate travelers will accept the offer to serve the general public are present in this case. The Pauls placed advertisements in magazines distributed to tourists and servicemen. Although radio announcements were addressed to "members" of Lake Nixon, 100,000 "members" use Lake Nixon's facilities each year and "members" bring guests. A reasonable conclusion is that a significant number of people know that Lake Nixon is in fact open to the white public in general and that a nominal membership fee of 25¢ is charged simply to exclude undesirables including Negroes (see dissenting opinion of Judge Heaney, 395 F. 2d at 130). The radio announcements suggest no geographical or other limitation on membership, 395 F. 2d at 130, n. 10 (dissenting opinion). That advertising is not geographically restricted is an important factor in finding an offer to serve interstate travelers. *Miller v. Amusement Enterprises, Inc.*, *supra*.

Lake Nixon is only 5 miles from a U. S. highway and 5 miles from the nearest State highway. For the courts below this was too remote to affect commerce (395 F. 2d at 123, 125; R. 57; 263 F. Supp. at 418). In *Evans v. Laurel Links, Inc.*, *supra*, however, the location of a golf course 4 blocks from a State highway and 5 miles from the nearest federal highway was deemed material to coverage under Title II of the 1964 Civil Rights Act.

There is no evidence that any inquiry is made as to the origin of "members" or their guests. No address is required on the membership cards, 395 F. 2d at 130, n. 9 (dissenting opinion). There is no list of members (R. 56; 263 F. Supp. at 417). No signs are posted excluding interstate travelers, 395 F. 2d at 130, n. 9 (dissenting opinion).

Not only does Lake Nixon offer to serve interstate travelers, but in addition a substantial portion of the food served and other products sold at the snack bar have moved in commerce. It is settled that substantial means "more than minimal". *Gregory v. Meyer*, 376 F. 2d 509, 511 n. 1 (5th Cir. 1967); *Newman v. Piggie Park Enterprise, Inc.*, 256 F. Supp. 941 (D. S. C. 1966), *rev'd on other grounds*, 377 F. 2d 433 (4th Cir. 1967), *modified and aff'd on other grounds*, 19 L. Ed. 1263 (1968) (18% is substantial); *Codogan v. Fox*, 266 F. Supp. 866 (M. D. Fla. 1967) (23.30% is substantial); *Hearings on S. 1732 Before the Senate Committee on Commerce*, 88th Cong., 1st Sess., ser. 26 at 24 (1963) (testimony of Attorney General Kennedy).

The only food served at the snack bar is hamburgers, hot dogs, sodas and milk (R. 12, 30, 35; 263 F. Supp. at 416); many soft drinks and hamburgers are sold (R. 32, 35). The District Court took judicial notice that the principal ingredients of bread are produced in states other than Arkansas, and that some of the ingredients of the soft drinks probably originated outside Arkansas (R. 58; 263 F. Supp. at 418). In addition, the snack bar contains a juke box manufactured outside of Arkansas; many of the records played on the juke box are also manufactured out of state (R. 55; 263 F. Supp. at 417). Therefore, the District Court and the Court of Appeals erred in failing to find that more than a minimal amount of the food served and the music played in the snack bar have moved in interstate commerce.

Because the snack bar is physically located within the premises of Lake Nixon and holds itself out as serving patrons of Lake Nixon; all of the facilities and privileges of Lake Nixon comprise a place of public accommodation within the contemplation of Title II.

Both the District Court and the Court of Appeals held that, because the gross income from food sales constitutes a relatively small percentage of the total gross income (23%) and the sale of food is merely an adjunct to the Pauls' principal purpose of providing recreational facilities, Lake Nixon is a single unit operation and thus not covered by 42 U. S. C. §2000a(b)(4). For the Eighth Circuit, coverage under Title II requires at least two establishments under separate ownership. See 395 F. 2d at 123. This holding is in conflict with the decision of every other court which has considered this subsection.

In *Fazzio Real Estate Co. v. Adams*, 396 F. 2d 146 (5th Cir. 1968), the Court held that where the operators of a bowling alley also operated a snack bar for the patrons of the bowling alley, the entire establishment was covered by this subsection. In *Fazzio*, income from the sale of food and beer represented 23% of the total gross income; income from the sale of food alone represented 8 to 11% of the total gross income. The Court held that even 8 to 11% could not be considered an insignificant adjunct and explicitly rejected the substantial business purpose test applied by the Eighth Circuit, compare 396 F. 2d at 150 with 395 F. 2d at 123. The Fifth Circuit stated, 396 F. 2d at 149:

The Act contemplates that the term "establishment" refers to any separately identifiable business operation without regard to whether that operation is carried on in conjunction with other service or retail sales oper-

ations and without regard to questions concerning ownership, management or control of such operations.

In *Evans v. Laurel Links, Inc.*, *supra*, the Court held an entire golf course within the coverage of Title II, because the operators of the golf course maintained a lunch counter for the patrons of the course. Income from food sales constituted 15% of the total gross income of the golf course. See also *Hamm v. Rock Hill*, *supra*; *Scott v. Young*, 12 Race Rel. L. Rep. 428 (E. D. Va. 1966) (recreational area with snack bar). The legislative history supports the majority rule. The Report of the House Judiciary Committee states that subsection (b)(4) "would include, for example, retail stores which contain public lunch counters otherwise covered by Title II". H. R. Rep. No. 914, 88th Cong., 1st Sess. 20 (1963).

Even under its own rule that Title II covers only separately managed but physically connected establishments, the Eighth Circuit erred in failing to find the snack bar's operations made Lake Nixon a public accommodation within the coverage of Title II. The evidence is that the snack bar is a separate enterprise managed by Mrs. Paul's sister pursuant to an oral contract whereby the Pauls and Mrs. Paul's sister share the profits from food sales (R. 32).

B. Lake Nixon Is Place of Entertainment as Defined by Title II of the 1964 Civil Rights Act

Even if Lake Nixon is found to be within the scope of subsection (b)(4) because of the presence of a snack bar within its premises, this Court should also determine whether Lake Nixon is a place of entertainment within the contemplation of the Civil Rights Act of 1964. The snack bar could be eliminated for the purpose of removing

Lake Nixon from Title II coverage; further litigation would then be necessary to determine whether Lake Nixon is a place of entertainment. This possibility is not fanciful for in a companion case involving a similar recreational area, all sales of food were discontinued after the petitioners instituted an action under Title II (R. 54; 263 F. Supp. at 417). In addition, the conflict between the Eighth Circuit's construction of "place of entertainment" and that of the Fifth Circuit in *Miller v. Amusement Enterprises, Inc.*, *supra*, should be resolved.

The Eighth Circuit also held Lake Nixon was not a "place of entertainment", because the Court found a total lack of evidence that Lake Nixon's activities or entertainment moved in commerce, 395 F. 2d at 125. The District Court defined "other place of entertainment" to mean an establishment where the patrons are spectators or listeners and their physical participation is non-existent or minimal, and held that Lake Nixon is not within this definition (R. 60; 263 F. Supp. at 419).

In *Miller v. Amusement Enterprises, Inc.*, *supra*, the Court of Appeals for the Fifth Circuit, sitting *en banc*, reversed the prior decision of a three-judge panel (reported at 391 F. 2d 86), and held that the Fun Fair amusement park is a place of entertainment within the coverage of Title II of the Civil Rights Act of 1964. Noting that it was not necessary to its decision, the Court held that even under a narrow construction of "place of entertainment" to include only places which present exhibitions for spectators, Fun Fair is a covered establishment, because "many of the people who assemble at the park come there to be entertained by watching others, particularly their own children, participate in the activities available", 394 F. 2d at 348. Swimming, boating, picnicking, sun-bathing

and dancing at Lake Nixon are certainly as much, if not more, spectator activities as ice-skating and "kiddie rides", see 394 F. 2d at 348.

In *Miller*, the Fifth Circuit rejected a narrow construction of "place of entertainment" and held that, in view of the inconclusive nature of the relevant legislative history and of the overriding purpose of the Civil Rights Act, "place of entertainment" should be construed liberally to mean "a place of enjoyment, fun and recreation", 394 F. 2d at 349.

The overriding purpose of Title II of the Civil Rights Act was to eliminate discrimination in those facilities which were the focal point of civil rights demonstrations. *Hearings on H. R. 7152 Before the House Comm. on the Judiciary*, 88th Cong., 1st Sess., ser. 4, pt. 4, at 2655 (1963) (Testimony of Attorney Gen'l Kennedy). President Kennedy clearly intended that recreational areas and other places of amusement be covered. *Hearings on Miscellaneous Proposals Regarding Civil Rights Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess., ser. 4, pt. 2, at 1448-1449 (1963). Facilities which were the focal point of demonstrations were consistently identified in both the Senate and House hearings as lodging houses, eating places, and places of amusement or recreation. 110 Cong. Rec. 7383 (1964) (Remarks of Sen. Young). While the Senate was debating the Act, there were demonstrations at the Gwynn Oak Amusement Park in Maryland; Senator Humphrey stated that this was proof of the need for this Act. 109 Cong. Rec. 12276 (1963).

Under either a narrow or a liberal construction of "place of entertainment", coverage depends on whether Lake Nixon customarily presents sources of entertainment which move in commerce. The Eighth Circuit could not discern

any evidence that any source of entertainment customarily presented by Lake Nixon moved in interstate commerce, 395 F. 2d at 125.

In fact, "sources of entertainment" were intended to include equipment. In a discussion of subsection (c)(3), Senator Magnuson, floor manager of Title II, pointed out that if "establishments which receive *supplies, equipment* or goods through the channels of interstate commerce . . . narrow their potential markets by artificially restricting their patrons to non-Negroes, the volume of sales and therefore, the volume of interstate purchases will be less," 110 Cong. Rec. 7402 (1964) (emphasis added). In the discussion of the demonstration at the Gwynn Oak Amusement Park, Senator Humphrey believed that the park would be covered by the Act in part because he was "confident that merchandise and facilities used in the park were transported across State lines," 109 Cong. Rec. 12276 (1963).

Lake Nixon purchases and leases its boats from an Oklahoma company. The Pauls rent two juke boxes which were manufactured outside Arkansas and which play records manufactured outside Arkansas. In view of these facts the Eighth Circuit is in direct conflict with Fifth Circuit's decision in *Miller*. The *Miller* Court relied in part on the fact that 10 of the 11 "kiddie rides" at the park were purchased from out of state, 394 F. 2d at 351, to find an effect on commerce. But the Court also concluded that even under a narrow construction of the Act, since Fun Fair is located on a major highway and does not geographically restrict its advertising, the logical conclusion is that a number of the patron-performers move in commerce, 394 F. 2d at 349. The same circumstances which make it reasonable to assume that some interstate travelers

will accept Lake Nixon's offer to serve the general public make it reasonable to assume that some of Lake Nixon's patron-performers move in commerce.

The Eighth and Fifth Circuits are also in conflict as to the meaning of "move (in commerce)". The District Court found that Lake Nixon's operations do not affect commerce on the ground that, although the boats, juke boxes and records have moved in commerce, they do not now move (R. 62; 263 F. Supp. at 420). The Court concluded that because the phrase, "has moved", appears in the section concerning eating facilities, Congress must have intended to limit the section concerning places of entertainment to sources which "move", and therefore sources of entertainment which have, but no longer move, are not covered (R. 61-62; 263 F. Supp. at 420). The Fifth Circuit, on the other hand, expressly concluded in *Miller* that Congressional use of the present tense of "move" was not intended to exclude other tenses, 394 F. 2d at 351-52.

The legislative history supports the conclusion of the Fifth Circuit. The Report of the Senate Committee on Commerce refers within a single paragraph to "sources of entertainment which move in interstate commerce" and "entertainment that has moved in interstate commerce", as within the contemplation of subsection (c)(3). S. Rep. No. 872 on S. 1732, 88th Cong., 2nd Sess. 13 (1964). See also 110 Cong. Rec. 6557 (1964) (remarks of Sen. Kuchel). In addition, a proposal to amend section 2000a(c)(3) to read "sources of entertainment which move in commerce and have not come to rest within a state" was rejected. 110 Cong. Rec. 13915, 13921 (1964). The subsequent debate indicates that Congress intended the bill to reach businesses which had a minimal or insignificant impact on interstate commerce. 110 Cong. Rec. 13924 (1964).

II.

Certiorari Should Be Granted to Determine Whether the Equal Right to Make and Enforce Contracts and to Have an Interest in Property, Guaranteed by 42 U. S. C. §§1981, 1982, Includes the Right of Negroes to Have Access to a Place of Public Amusement.

In the Civil Rights Act of 1866, enacted pursuant to the Thirteenth Amendment, Congress provided, *inter alia*, for citizens to have the same right to make and enforce contracts and have an interest in property as is enjoyed by white citizens. These provisions are now embodied in 42 U. S. C. §§1981, 1982. Petitioners have been denied this right because the Pauls refused them the right to acquire for 25¢, a so-called "membership" in Lake Nixon Club solely on racial grounds. The district court found that "white applicants for membership are admitted as a matter of routine" (R. 56; 263 F. Supp. at 417).

In *Jones v. Mayer*, 36 U. S. L. W. 4661 (U. S. June 17, 1968), this Court held that §1982 forbade privately inflicted racial discrimination with respect to the acquisition and use of real property. This cause presents the important question whether the *Jones* principle applies, either directly or by necessary implication, to a place of public amusement. Neither of the lower courts ruled on this issue since *Jones* was decided subsequent to the Eighth Circuit's denial of rehearing.

In *Jones* this Court found §1982 justified as a legitimate exercise of Congressional power under the Thirteenth Amendment outlawing badges and incidents of slavery. This approval of the equal property rights guarantee of §1982

is directly applicable here because admission to Lake Nixon is in the nature of a right to use, for a time, the real and personal property of which the area consists. The fact that §1982 was not pleaded below does not bar petitioners from relying on it here because this Court has made clear that the "mere failure" to raise a constitutional question "prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground" *Curtis Publishing Co. v. Butts*, 388 U. S. 130, 142-143 (1967), and cases cited. Furthermore, this precise issue was before this Court just last term in *Sullivan v. Little Hunting Park*, 36 U. S. L. W. 3481 (U. S. June 17, 1968) where this Court vacated the judgment of the Virginia Court of Appeals and remanded the case for further consideration in light of *Jones* even though the *Sullivan* petitioners did not rely on §1982 in the Virginia courts.

In any case, 42 U. S. C. §1981, which was specifically pleaded in the complaint herein, outlaws racial discrimination in contractual arrangements and, therefore, applies here because petitioners' race was the sole reason they were not permitted to purchase "membership" privileges at Lake Nixon.² It follows that the *Jones* holding that the 1866 Civil Rights Act, of which §1981 was an integral part, bars private racial discrimination is at least as applicable to Lake Nixon's "memberships" as it was to the corporate shares in *Sullivan v. Little Hunting Park*, *supra*.

² There is little doubt that purchase of "membership" privileges, like the purchase of a ticket, to a place of public amusement includes judicially enforceable contractual rights, see *Griffin v. Southland Racing Corp.*, 236 Ark. 872, 370 S. W. 2d 429 (1963); *Vallee v. Stengel*, 176 F. 2d 697 (3rd Cir. 1949).

CONCLUSION

For the foregoing reasons the writ of certiorari should issue as prayed and the judgment of the United States Court of Appeals for the Eighth Circuit should be reversed or, in the alternative, vacated and remanded for further consideration in light of *Jones v. Mayer*, 36 U. S. L. W. 4661 (U. S. June 17, 1968).

Respectfully submitted,

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Of Counsel

United States District Court Eastern District
of Arkansas Western Division

Kyle and Doris Daniel
Plaintiffs.

LR 66-118

Paul, Jr., Individually and as Owner
Manager or Operator of the Lake
Club

Defendant.

Kyle and Doris Daniel
Plaintiffs.

APPENDIX

LR 66-119

Carlson, Individually and as
Owner, Manager or Operator of Spring
Lake, Inc.

Defendant.

Memorandum Opinion of the District Court

These two suits in equity, brought under the provisions of Title II of the Civil Rights Act of 1964, P.L. 88-352, et seq., 78 Stat. 243 et seq., 42 U.S.C. 2000a, and 2000a-1 through 2000a-6, have been removed to this Court and have been tried to the Court without a jury.

Federal jurisdiction is not questioned and is established conclusively by reference to section 207 of the U.S.C.A. 2000a-4.

The Kyle and Doris Daniel of Little Rock, Arkansas, are the plaintiffs in No. 149. Mr. and Mrs. Paul, Jr. and operate a recreational lake known as Lake Club. The corporate defendant in the Spring Lake Club, Inc. own and operate a recreational lake known as Spring Lake. All of the...

CONCLUSION

For the foregoing reasons the writ of certiorari should have as prayed and the judgment of the United States Court of Appeals for the Eighth Circuit should be reversed or, in the alternative, vacated and remanded for further consideration in light of *James v. Mayer*, 36 U. S. L. W. 4661 (U. S. June 17, 1966).

Respectfully submitted, ✓

APPENDIX

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In the United States District Court Eastern District
of Arkansas Western Division

Rosalyn Kyles and Doris Daniel,)
Plaintiffs,)

v.

) LR-66-C-149

Euell Paul, Jr., Individually and as Owner)
Manager or Operator of the Lake)
Nixon Club,)
Defendant.)

Rosalyn Kyles and Doris Daniel,)
Plaintiffs,)

v.

) LR-66-C-150

J. A. Culberson, Individually and as)
Owner, Manager or Operator of Spring)
Lake, Inc.)
Defendant.)

Memorandum Opinion of the District Court

These two suits in equity, brought under the provisions of Title II of the Civil Rights Act of 1964, P.L. 88-352, §§201 et seq., 78 Stat. 243 et seq., 42 U.S.C.A., §§2000a and 2000a-1 through 2000a-6, have been consolidated for trial and have been tried to the Court without a jury. Federal jurisdiction is not questioned and is established adequately by reference to section 207 of the Act, 42 U.S.C.A., §2000a-6.

Plaintiffs are Negro citizens of Little Rock, Pulaski County, Arkansas. The defendants in No. 149, Mr. and Mrs. Euell Paul, Jr., own and operate a recreational facility known as Lake Nixon. The corporate defendant in No. 150, Spring Lake Club, Inc., own and operate a similar facility known as Spring Lake. All of the stock

in Spring Lake Club, Inc., except one qualifying share, is owned by the defendant, J. A. Culberson, and his wife.

The two establishments are not far from each other. Both are located in Pulaski County some miles west of the City of Little Rock. In July 1966 the two plaintiffs presented themselves at both establishments and sought admission thereto. They were turned away in both instances on the representation that the establishments were "private clubs."

On July 19 plaintiffs commenced these actions on behalf of themselves and others similarly situated. The complaints allege in substance that both Lake Nixon and Spring Lake are "Public Accommodations" within the meaning of Title II of the Act, and that under the provisions of section 201(a) they, and others similarly situated, are "entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations (of the facilities) without discrimination or segregation on the ground of race, color, religion, or national origin." They pray for appropriate injunctive relief as provided by section 201 of the Act.

In their answers the defendants' deny that Lake Nixon and Spring Lake are public accommodations within the meaning of the Act; affirmatively, they plead that the two facilities are "private clubs" and are exempt from the Act by virtue of section 201(a), even if initial coverage exists.

Sections 201(a) and 201(b) of the Act prohibit racial discrimination in certain types of public accommodations if their operations "affect" interstate commerce, or if racial discrimination or segregation in their operation is "supported by State action."

¹Originally, the suits were brought against Mr. Paul and Mr. Culberson only. At the commencement of the trial Mrs. Paul and Springs Lake Club, Inc., were made parties defendant without objection, and they have adopted, respectively, the answers of Mr. Paul and Mr. Culberson.

Section 201(b) makes the prohibition applicable to four categories of business establishments, namely:

"(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

"(2) any restaurant, cafeteria, lunchroom, lunch counter soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

"(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

"(4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment."

Section 201(c) sets forth criteria whereby it may be determined whether an establishment affects interstate commerce. That section is as follows:

"The operations of an establishment affect commerce within the meaning of this subchapter if (1) it is one of the establishments described in paragraph (1) of subsection (b) of this section; (2) in the case of an establishment described in paragraph (1) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents films, performances, athletic teams, ex-

hibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) of this section, it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several states, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country."

Section 101(d) is as follows:

"Discrimination or segregation by an establishment is supported by State action within the meaning of this subchapter if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof."

The exemption invoked by defendants appears in section 201(e) which provides that the provisions of Title II of the Act do not apply to "a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section."

Federal prohibitions of racial, ethnic or religious discrimination or segregation in State and municipal facilities are based ultimately on the 14th Amendment to the Constitution of the United States. Title II of the Civil Rights Act of 1964 finds its constitutional sanction in the commerce clause of the Constitution itself. Constitution, Article 1, Section 8, Clause 3. That Title II, as written, is constitutional is now settled beyond question, at least

as far as this Court is concerned at this time. *Heart of Atlanta Motel v. United States*, 379 U.S. 241; *Katzbach v. McClung*, 379 U.S. 294; *Willis v. The Pickrick Restaurant, E.D. Ga.*, 231 F.Supp. 396, appeal dismissed; *Maddox v. Willis*, 382 U.S. 18, rehearing denied, 382 U.S. 922.

The rationale of those holdings is that Congress permissibly found that racial discrimination, including racial segregation, in certain types of business establishments adversely affects interstate commerce, and acted constitutionally to prohibit such discrimination. These cases also establish that, even though practices on the part of an individual enterprise have no significant or even measurable impact on commerce, such practices by such enterprise are prohibited where they are of a type which Congress has found affects commerce adversely.

In coming to the latter conclusion the Court in *McClung* drew an analogy between an individual business man who practices racial discrimination and an individual farmer who violates a provision of the Government farm program. It was said (pp. 300-301 of 379 U.S.):

"It goes without saying that, viewed in isolation, the values of food purchased by Ollie's Barbecue from sources supplied from out of state was insignificant when compared with the total foodstuffs moving in commerce. But, as our late Brother Jackson said for the Court in *Wickard v. Filburn*, 317 U.S. 111 (1942):

"That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution taken together with that of many others similarly situated, is far from trivial"

The burden in these cases is upon the plaintiffs to establish, first, that the facilities in question are establishments covered by the Act and, second, that plaintiffs have been subjected to racial discrimination prohibited by the Act. On the other hand, the burden is upon the respective defendants to show that they are entitled to the private club exemption which they invoke.

* There is no serious dispute as to the facts in either case.

Lake Nixon has been a place of amusement in Pulaski County for many years. Several years ago the properties were acquired and improved by Mr. and Mrs. Paul, the present owners and operators. The Spring Lake property was acquired by Mr. Culberson in the spring of 1965 and the Spring Lake Club, Inc., was organized as an ordinary business and corporation under the general corporation laws of Arkansas on April 12 of that year.² Both establishments are operated for the financial profit of the owners or owner. During 1963 and 1966 Lake Nixon earned substantial profits; Mr. Culberson is not sure whether Spring Lake has earned profits; no dividends have been paid by the corporation, and Mr. Culberson has drawn no salary. He is engaged in a number of business enterprises, and Spring Lake is actually operated by hired employees of the corporation.

The facilities available at both establishments are essentially the same although those at Lake Nixon are considerably more extensive than those available at Spring Lake. Primarily, the recreation offered is of the outdoor type, such as swimming, boating, picnicing, and sun bathing. Lake Nixon also has a miniature golf course.

There is a snack bar at each establishment at which hamburgers, hot dogs, some sandwiches, soft drinks, and milk are sold to patrons during 1965 and 1966. However, the snack bar operations were purely incidental to the recreational facilities, and the income derived from the sales of food and drinks was small in comparison to the income derived from fees for the use of the recreational facilities. About the middle of August 1966 and after this suit was filed, the sale of food items at Spring Lake was discontinued entirely.

²Mr. Culberson did not recall definitely whether title to the property was taken originally in his name and then transferred to the corporation or whether the former owner conveyed directly to the corporation. The matter is not material. Mr. Culberson's primary purpose in incorporating his operation was to avoid personal tort liability in case of accidental injury to a patron.

In each of the snack bars there is located a mechanical record player, commonly called a "Juke Box," which patrons operate by the insertion of coins. Patrons may dance to the juke box music or may simply sit and listen to it. There is no dispute that the juke boxes were manufactured outside of Arkansas, and the same thing may be said about at least many of the records played on the machines. The machines are rented from their local owner or owners by both of the establishments here involved.

During the months in which Lake Nixon is open, a dance is held once a week on Friday or Saturday night. An attendance charge is made with respect to these dances, and there is "live music" supplied by local bands made up of young people who call themselves by such names as "The Romans," "The Pacers," or "The Gents." Although the bands are compensated for their playing, actually the musicians are little more than amateurs, and their operations do not in general extend beyond the Little Rock-North Little Rock areas; certainly, there is nothing to indicate that these young musicians move in interstate commerce.

On occasions similar dances are held at Spring Lake, but they are sporadic and care is taken not to schedule a dance at Spring Lake for the same night on which a dance is to be held at Lake Nixon.

The operators of both facilities have stated candidly that they do not want to serve Negro patrons for fear of loss of business, and they do not desire to be covered by the Act. In this connection it appears that Mr. Culberson is willing to do just about anything in the future to avoid coverage if Spring Lake is in fact covered and non-exempt at this time.

Following the passage of the Act, Mr. and Mrs. Paul began to refer to their operation as a private club, and patrons have been required, at least during 1965 and 1966, to purchase "memberships" for the nominal fee of twenty-five cents a year or per season. These

fees are in addition to regular admission charges. A similar procedure has been following at Spring Lake which was not organized until after the passage of the Act. At Lake Nixon "memberships" to the "club" are sold by either Mr. or Mrs. Paul; at Spring Lake "memberships" are sold by whatever employee or employees happen to be in charge of the operation at the time.

The Court finds that neither facility has any membership committee; there is no limit on the number of members of either "club,"³ no real selectivity is practiced in the selection of members; although at each establishment the management reserves the right to refuse to admit undesirables; there are no membership lists. The Pauls do not know how many people are "members" of the Lake Nixon Club; Mr. Culberson estimates that Spring Lake, the smaller of the operations, has about 4,000 "members." Subject to a few more or less accidental exceptions at Spring Lake, Negroes are not admitted to "membership" in either "club." White applicants for membership are admitted as a matter of routine unless there is a personal objection to an individual white person making use of the facilities.

The record reflects that during 1965 and 1966 Lake Nixon has used the facilities of Radio Station KALO to advertise its weekly dances; the announcements were made on Wednesday, Thursdays, and Fridays of each week from the last of May through September 7. During the same period, Lake Nixon inserted one advertisement in "Little Rock Today," a monthly magazine indicating available attractions in the Little Rock area, and inserted one advertisement in the "Little Rock Air Force Base," a monthly newspaper published at the Little Rock Air Force Base at Jacksonville, Arkansas.

³When plaintiffs applied for admission to Lake Nixon and asked about joining the "club," they were told that the membership was full; the Pauls now admit that such statement was false in that there has never been and is not now any limit to the "membership" of the "club".

On June 4, and June 30, 1966, Spring Lake advertised Saturday night dances over Radio Station KALO; on May 26, 27, and 28 a dance was advertised over Station KAAY. Station KALO apparently leased the premises for a picnic held in July and advertised that picnic from June 6 through July 16.

In 1965 Spring Lake advertised certain dances by means of announcements over Station KALO. Two of these announcements indicated that there would be diving exhibitions during the intermissions, and one of the announcements was to the effect that in addition to the diving exhibition there would be a display of fireworks.

The record contains a sample of a brochure put out by Spring Lake; that brochure shows pictures of the facilities, describes them in some detail, refers without emphasis to "guest fees" in addition to the regular admission charge and points out that the fee of twenty-five cents is to be paid only once. Readers of the brochure are advised that the facilities may be reserved for private parties by telephoning "well in advance." The brochure also contains a map showing one how to reach Spring Lake, and the "membership cards" of Spring Lake depict a similar map.

As stated, both establishments are located some miles west of Little Rock. Both are accessible by country roads; neither is located on or near a State or federal highway. There is no evidence that either facility has ever tried to attract interstate travelers as such, and the location of the facilities is such that it would be in the highest degree unlikely that an interstate traveler would break his trip for the purpose of utilizing either establishment. Of course, it is probably true that some out-of-state people spending time in or around Little Rock have utilized one or both facilities.

Food and soft drinks are purchased locally by both establishments. The record before the Court does not disclose where or how the local suppliers obtained the products which they sold to the establishments. The

meat products sold by defendants may or may not have come from animals raised, slaughtered, and processed in Arkansas. The bread used by defendants was baked and packaged locally, but judicial notice may be taken of the fact that the principal ingredients going into the bread were produced and processed in other States. The soft drinks were bottled locally, but certain ingredients were probably obtained by the bottlers from out-of-State sources.

Turning now to the law, the Court will take up the issues in what appears to it to be a convenient, if perhaps not a strictly logical, order.

Defendants' claims of exemption as private clubs will be rejected out of hand. The Court finds it unnecessary to attempt to define the term "private club," as that term is used in section 201(a) because the Court is convinced that neither Lake Nixon nor Spring Lake would come within the terms of any rational definition of a private club which might be formulated in the context of an exception from the coverage of the Act. Both of these establishments are simply privately owned accommodations operated for profit and open in general to all of the public who are members of the white race. Cf. *United States v. Northwest Louisiana Restaurant Club*, W.D. La., 256 F. Supp. 151.

The Court finds without difficulty that plaintiffs were excluded from both facilities because they are Negroes. That fact was expressly admitted by Mr. Paul speaking for Lake Nixon and is inferable if not substantially admitted with respect to Spring Lake. The Court finds also that any other individual Negroes who might have applied for admission to the facilities during 1966 would have been excluded on account of their race, and that defendants will continue to exclude Negroes unless the Court determines that the facilities are covered by the Act.

This brings the Court to a consideration of the basic issue of coverage. The question is not whether Lake

Nixon and Spring Lake are "public accommodations," but whether they are public accommodations falling within one or more of the four categories of establishments covered by the Act.

It is not suggested that either establishment falls within the first statutory category, and the Court is persuaded that neither falls within the fourth. In that connection the Court finds that both Lake Nixon and Spring Lake are single unit operations with the sales of food and drink being merely adjuncts to the principal business of making recreational facilities available to the public. Section 201(b)(4) plainly contemplates at least two establishments, one of them covered by the Act, operating from the same general premises. See e.g. *Pinkney v. Meloy*, M.D. Fla., 241 F. Supp. 943. That situation does not exist here.

The second category set out in section 201(b)(2) consists of establishments "principally engaged" in the sale of food for consumption on the premises. Food sales are not the principal business of the establishments here involved, and the second category does not cover them. Cf. *Newman v. Piggie Park Enterprises, Inc.*, D.C., S.C., 256 F. Supp 941.⁴

The third category, section 201(b)(3), includes certain specifically described places of exhibition or entertainment and also "any other place of exhibition or entertainment." It is clear that neither Lake Nixon nor Spring Lake is a motion picture house, concert hall, theatre, sports arena, or stadium. Hence, if either establishment is covered by the third category it must be on the theory that it falls within the catch-all phrase, above quoted.

Determination of the scope of the catch-all phrase calls for an application of the Rule of ejusdem generis

⁴In using the term "food sales" the Court includes sales of both food and soft drinks. That sales of drinks would not be considered as sales of "food" is indicated by *Chava v. Sdrales*, 10' Cir., 344 F. 2d 1019; *Robertson v. Johnston*, E.D. La., 249 F. Supp. 615; *Tyson v. Cazes*, E.D. La., 238 F. Supp. 937, rev'd on other grounds, 3 Cir. 363 F. 2d 742.

Robertson v. Johnston, E.D. La., 248 F.Supp. 618, 622. In that case it was pointed out that "place of entertainment" is not synonymous with "place of enjoyment." And in addition this Court will point out that "entertainment" and "recreation" are not synonymous or interchangeable terms.

The statutory phrase "other place of exhibition or entertainment" must refer to establishments similar to those expressly mentioned. When one considers the exhibitions and entertainment offered by motion picture houses, theatres, concert halls, sports arenas and stadiums, it is clear at once that basically patrons of such establishments are edified, entertained, thrilled, or amused in their capacity of spectators or listeners; their physical participation in what is being offered to them is either non-existent or minimal; their role is fundamentally passive.

The difference in what is offered by the establishments named in section 201(b)(3) and what is offered at Lake Nixon and Spring Lake is obvious. The latter establishments do not offer "entertainment" in the sense in which the Court is convinced that Congress used the word; what they offer primarily are facilities for recreation whereby their patrons can enjoy and amuse themselves.

In adopting section 201(b)(3) Congress must have been aware that "entertainment" and "recreation" are not synonymous or co-extensive, and had Congress intended to provide coverage with respect to a "place of recreation," it could have said so easily. The Court thinks that it is quite significant that neither the category in question nor any other category mentioned in section 201(b) makes any mention of swimming pools, or parks, or recreational areas, or recreational facilities. And the Court concludes that establishments like Lake Nixon and Spring Lake do not fall within section 201(b)(3) or any other category appearing in that section as it is presently drawn.

In coming to this conclusion the Court has not overlooked the dancing which has gone on at both establishments or the diving exhibitions and fireworks display at

Spring Lake. These exhibitions and that display were isolated events which took place in 1965, which have not been repeated, and which Mr. Culberson says will not be repeated. They were insignificant anyway, and it appears that the diving, which was done by life savers employed by Spring Lake, was not so much for the purpose of entertaining patrons as to demonstrate to them the competency of the life saving personnel.

As to the dancing, there are two things to be said: first, the dances held at Spring Lake play no significant part in the operations of that establishment, and the part played by the dances held regularly at Lake Nixon would seem to play a minor role in the Lake Nixon operation. Second, and more basically, it seems to the Court that dancing, whether to "live music" or to records played on a juke box, falls more within the concept of "recreation" than within the concept of "entertainment".

But, even if it be conceded to plaintiffs that the challenged establishments are "places of entertainment," the Court cannot find that under the law their operations affect interstate commerce. Certainly, the racial discrimination which the defendants have practiced has not been supported by the State of Arkansas or any of its political subdivisions.

Referring to section 201(c), the criterion which it establishes for the determination of whether a place of exhibition or entertainment "affects commerce" is whether the establishment in question customarily presents films, performances, athletic teams, exhibitions or other sources of entertainment which move in commerce." (Emphasis supplied.)

(The emphasized words are not without significance when read in comparison with the statutory criterion for determining whether the operations of an eating establishment affect interstate commerce. With regard to such an establishment it is sufficient if it has served or offered to serve interstate travelers or if a substantial portion of the food which it serves has moved in inter-

state commerce. There is a distinct difference between person or thing which moves in interstate commerce and a person or thing which simply has moved in interstate commerce.

As indicated, there is no evidence here and no reason to believe that the local musicians who play for the dances at Lake Nixon and Spring Lake have ever moved as musicians in interstate commerce or that they are now doing so. Nor do the juke boxes, the records and other recreational apparatus, such as boats, utilized at the respective establishments "move" in interstate commerce, although it is true that the juke boxes, some of their records, and part of the other recreational equipment and apparatus were brought into Arkansas from without the State.

The Court's approach to and its solution of the problems presented by these cases find full support in the opinion of Judge West in *Miller v. Amusement Enterprises, Inc.*, E.D. La., 239 F.Supp. 323, a case involving a privately owned amusement park in Baton Rouge, Louisiana.⁵

From what has been said it follows that a decree will be entered dismissing the complaints in the respective cases.

Dated this 1st day of February, 1967.

s/ J. Smith Henley

United States District Judge

⁵That case was decided on September 13, 1966, and the opinion was published on December 12 of that year after the instant cases were tried.

Decree

These two cases having been consolidated for purposes of trial and having been tried together, and the Court being well and sufficiently advised, and having filed herein its opinion incorporating its findings of fact and conclusions of Law in both cases,

It is by the Court Considered, Ordered, Adjudged, and Decreed that plaintiffs in said cases take nothing by their complaints, and that both of said complaints be, and they hereby are, dismissed with prejudice and at the cost of plaintiffs.

Dated this 1st day of February, 1967.

s/ J. Smith Henley

United States District Judge

Opinion of the United States Court of Appeals

**United States Court of Appeals
FOR THE EIGHTH CIRCUIT**

No. 18,824

Mrs. Doris Daniel and Mrs. Rosalyn Kyles,

v.

Appellants,

Euell Paul, Jr., Individually and as
Owner, Operator or Manager of
Lake Nixon Club,

Appellee.

Appeal from the
United States District Court for the
Eastern District of
Arkansas.

[May 3, 1968.]

Before VAN OOSTERHOUT, Chief Judge; MEHAFFY and
HEANEY, Circuit Judges.

MEHAFFY, Circuit Judge.

Doris Daniel and Rosalyn Kyles, plaintiffs-appellants, Negro citizens and residents of Little Rock, Pulaski County, Arkansas, were refused admission to the Lake Nixon Club, a recreational facility located in a rural area of Pulaski County and owned and operated by the defendant-appellee Euell Paul, Jr. and his wife, Oneta Irene Paul. Plaintiffs

brought this suit seeking injunctive relief from an alleged discriminatory policy followed by defendant denying Negroes the use and enjoyment of the services and facilities of the Lake Nixon Club.¹ This suit was brought as a class action under Title II of the Civil Rights Act of 1964, P.L. 88-352, §§ 201 *et seq.*, 78 Stat. 243 *et seq.*, 42 U.S.C. §§ 2000a *et seq.*, alleging that the Lake Nixon Club is a "public accommodation" as the term is defined in the Act, and that, therefore, it is subject to the Act's provisions.

For the purpose of trial this case was consolidated with a similar suit brought by plaintiffs against Spring Lake Club, Inc. The trial was to Chief District Judge Henley who held that neither Lake Nixon Club nor Spring Lake, Inc. was a "public accommodation" as defined in and covered by Title II of the Civil Rights Act of 1964, and ordered dismissal of the complaints. We are concerned solely with the court's decision with regard to Lake Nixon Club, since there was no appeal from the portion of the decision regarding Spring Lake, Inc. Chief Judge Henley's memorandum opinion is published at 263 F.Supp. 412. We affirm.

The plaintiffs alleged in their complaint that the Lake Nixon Club is a place of public accommodation within the meaning of 42 U.S.C. §§ 2000a *et seq.*; that it serves and offers to serve interstate travelers; that a substantial portion of the food and other items which it serves and uses moves in interstate commerce; that its operations affect travel, trade, commerce, transportation, or communication among, between and through the several states and the District of Columbia; that the Lake Nixon Club is operated under the guise of being a private club solely for

¹ At the trial, an oral amendment was made and accepted making Mrs. Paul a party to the action.

the purpose of being able to exclude plaintiffs and all other Negro persons; and that the jurisdiction of the court is invoked to secure protection of plaintiffs' civil rights and to redress them for the deprivation of rights, privileges, and immunities secured by the Fourteenth Amendment to the Constitution of the United States, Section 1; the Commerce Clause, Article I, Section 8, Clause 3 of the Constitution of the United States; 42 U.S.C. § 1981, providing for the equal rights of citizens and all persons within the jurisdiction of the United States; and Title II of the Civil Rights Act of 1964, 78 Stat. 243, 42 U.S.C. §§ 2000a *et seq.*, under which they allege that they are entitled to an injunction restraining defendant from denying them and others similarly situated admission to and full use and enjoyment of the "goods, services, facilities, privileges, advantages, and accommodations" of the Lake Nixon Club.

The defendant denied that Lake Nixon is a place of public accommodation within the meaning of the Act; denied that Lake Nixon serves or offers to serve interstate travelers or that a substantial portion of the food and other items which it serves and uses moves in interstate commerce; denied that its operations affect travel, trade, commerce, transportation or communication between and through the several states and the District of Columbia within the meaning of the Act; and, further answering, averred that defendant operates Lake Nixon Club as a place to swim; that he has a large amount of money invested in the facility; that if he is compelled to admit Negroes to the lake, he will lose the business of white people and will be compelled to close his business; that the value of his property will be destroyed; and that he will be deprived of his rights under the Fourteenth Amendment to the Constitution of the United States.

The provisions of the Civil Rights Act of 1964 which define "a place of public accommodation" as covered by the Act, and which plaintiffs contend bring the Lake Nixon Club within its coverage, are contained in 42 U.S.C. § 2000a (b), and provide as follows:

"(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter *if its operations affect commerce*, or if discrimination or segregation by it is supported by State action:

"(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

"(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

"(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

"(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment." (Emphasis added.)

It will be noted that an establishment falling in any of the four categories outlined above is covered by the Act only "if discrimination or segregation by it is supported by State action," which is not contended here, or "if its

operations affect commerce." The criteria for determining whether an establishment affects commerce within the meaning of the Act are set forth in 42 U.S.C. § 2000a (c), as follows:

"(c) The operations of an establishment affect commerce within the meaning of this subchapter if (1) it is one of the establishments described in paragraph (1) of subsection (b) of this section; (2) in the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents, films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) of this section, it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, 'commerce' means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country."

The facts in the case are relatively simple and not in material dispute. The Lake Nixon property, consisting of 232 acres, is located on a country road several miles from the City of Little Rock and is not close to any state or federal highway. In 1962 Paul and his wife purchased this property, and since that time they have made their

home there and operated the facility for recreational purposes. In 1964 they adopted a club plan in order to prevent undesirables from using the facility, with no thought of simply excluding Negroes, as no Negro had ever sought admission.² A membership fee of 25¢ per person per season was charged. The only Negroes who ever sought admission were the two plaintiffs and a young Negro man who accompanied them to Lake Nixon on July 10, 1966. When they sought to use the facilities, Mrs. Paul told them that the membership was filled, but candidly testified at the trial that their admission was denied because of their race. In response to written interrogatories propounded to Mr. Paul in a discovery deposition, he replied that he and his wife exercised their own judgment in accepting applicants for membership and refused those whom they did not want. Referring to the plaintiffs, Mr. Paul stated:

"At that time, we refused admission to them because white people in our community would not patronize us if we admitted Negroes to the swimming pool. Our business would be ruined and we have our entire life savings in it."

Mr. and Mrs. Paul invested \$100,000.00 in the property, and, although it is operated only during the swimming season—from some time in May until early September depending upon the weather—it has earned a substantial and comfortable livelihood for them, producing net profits in excess of \$17,000.00 annually.

² In this regard, Mrs. Paul testified as follows:

"Q. Now, what do you have out there, Mrs. Paul, by way of facilities for the people that come out there; do you operate it as a club?"

"A. Yes, we do, we operate it as a club."

"Q. Now, at the time you put this on a club basis did you do it for the purpose of excluding Negroes?"

"A. Well, no, because there had never been any out there; it was five miles to the closest Negro addition; and it was really the last thing on our mind at the time; we had to do it to eliminate undesirables."

Plaintiff Mrs. Doris Daniel, who lived in Little Rock some twelve miles from Lake Nixon, was the only witness who testified on behalf of the plaintiffs. The other evidence is incorporated in pretrial answers to interrogatories and the testimony of Mr. and Mrs. Paul. Mrs. Daniel testified that she was employed as a secretary for Christopher C. Mercer, Jr. She further testified that she went to Lake Nixon Club on about July 10, 1966, accompanied by a girl friend, Rosalyn Kyles, the other plaintiff, and a male acquaintance. She told the attendant at the admission window that they would like to come in but was advised that they would have to wait and see the lady in the next room. Mrs. Paul was the lady to whom they were referred, and Mrs. Daniel testified that "she asked if we were members; and we stated we weren't; she said we would have to be members to come in; and we asked to get application to apply for membership and she said I'm sorry, but we're filled up." This witness had never been to Lake Nixon before and testified that she had heard the advertising on the radio and people talking about it and went out to look it over, and perhaps participate in some of the activities. She took her swimming suit with her.

While the principal attraction at Lake Nixon is swimming, the facility also had, at the time of the trial of this case, fifteen aluminum paddle boats available for rent; two coin-operated juke boxes, and a miniature golf course. Also operated in connection with the business was a snack bar which offered for sale hamburgers, hot dogs, milk and soft drinks, but did not stock or sell coffee, tea, cigars, cigarettes, sugar or beer. On Friday nights there usually would be a dance at Lake Nixon with "live music" furnished by young musicians from the Little Rock area who were amateurs and also patrons of the facility. There is no evidence that they ever played outside this immediate

locality, but to the contrary the undisputed evidence indicates that they did not.³

Mr. Paul further stated in response to interrogatories that during the preceding twelve months the Lake Nixon Club had advertised only twice in a paper or magazine—one time in May in a local monthly magazine entitled "Little Rock Today," and one time in June in a monthly paper published at the Little Rock Air Force Base. Announcements of the dances were also made on a local radio station, inviting members of the club to attend.⁴

³ Mr. Paul testified on cross-examination as follows:

"Q. Now, did you have bands out at your place on the week ends?

"A. Yes.

"Q. Were they local bands?

"A. Yes.

"Q. Do you know whether those bands happened to play in Jacksonville?

"A. No.

"Q. You really don't know where they played, do you?

"A. Yes, I'm pretty certain they played just right here in Little Rock.

"Q. Just for you; what band was it?

"A. Well, we had the Romans, the Loved Ones. I can't remember the names of all—

"Q. You had a lot of different bands?

"A. Yes.

"Q. How can you be sure that they just played in Little Rock?

"A. Because they were members there and were frequently out there; they mostly worked in town and this was a hobby; they were not professionals."

⁴ Mr. Paul testified as follows:

"Q. Did you advertise for persons to come and make use of the facilities during the summer?

"A. Members only.

"A. Our opening statement was basically, well, specifically stated that it was for members only.

"Q. For members only?

"A. Yes."

Mrs. Paul testified as follows:

"Q. I believe there has been some evidence introduced of the ads you had over the radio, were those ads addressed to members of the club?

"A. Members of Lake Nixon.

"Q. To members of Lake Nixon?

"A. To all members of Lake Nixon it usually ran."

The food business at Lake Nixon was minimal. According to the stipulation of the parties, the net income from food and concession sales was only \$1,412.62 for the entire 1966 season. There were an estimated 100,000 admissions to Lake Nixon during the season and the food sold there was a minor and insignificant part of the business. The testimony was that the club was not in the food business but merely had the snack bar as a necessary adjunct to serve those who wished to refresh themselves during an afternoon or evening of participation in the various forms of recreation offered—swimming, boating, miniature golfing, or dancing.⁵

The district court found that Lake Nixon was not a private club but was simply a privately owned accommodation operated for profit and open in general to all members of the white race. The court further found that the defendants were excluded on account of their race but that the Lake Nixon Club did not fall within any of the four categories designated by Congress as "public accommodations" which affect commerce within the meaning of the Civil Rights Act of 1964, and, therefore, the Club was not subject to its provisions. We agree with the court's conclusion.

Plaintiffs do not contend that Lake Nixon falls within the first category pertaining to inns, hotels, motels, etc. They do, however, contend that the three remaining categories bring it within the Act.

⁵ Mr. Paul testified on cross-examination as follows:

"Q. But sales from sandwiches and the like did account for a large degree of your gross sales; is that true?"

"A. No, very minor what we make off of that; food was just a commodity to have there for the people if they wanted it; I mean we were not in the food business—there was no restaurant—it was just a necessity."

As hereinbefore pointed out, the second category includes "any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises," if its operations affect commerce, but not otherwise. In determining whether its operations affect commerce, we must look to 42 U.S.C. § 2000a (c), which provides that the operations of an establishment affect commerce within the meaning of this subchapter in the case of an establishment described in paragraph (2) of subsection (b), if it "serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce."

The trial court found that there was no evidence that the Lake Nixon Club has ever tried to attract interstate travelers as such, and that the location of the facility is such that it would be of the highest degree unlikely that an interstate traveler would break his trip for the purpose of utilizing its facilities, it being located on a country road remote from either a federal or a state highway. With regard to the food served, the trial court reasoned that since the second category consists of establishments "principally engaged" in the sale of food for consumption on the premises and since food sales are not the principal business of the Lake Nixon Club, it would not be included in the second category. In this connection, the court held that the Lake Nixon Club was a single unitized operation, with the sale of food and drink being merely adjuncts to the principal business of making recreational facilities available to the public, and that, therefore, it would not come within the fourth category making the Act applicable to an establishment otherwise covered or within the premises of which is physically located any such covered establishment.

With regard to whether a substantial portion of the food which Lake Nixon serves has moved in commerce, the trial court found that food and soft drinks were purchased locally by the Club but noted that the record before the court did not disclose where or how the local suppliers obtained the products. The court further observed that the meat products sold by the defendants may or may not have come from animals raised, slaughtered, and processed in Arkansas. It also made an observation that the bread used in the sandwiches was baked and packaged locally but took judicial notice that the principal ingredients going into the bread were produced and processed in other states. This observation on the part of the court, however, was entirely voluntary, and the ingredients in the bread would not constitute a substantial part of the food served. We might add that it is a matter of common knowledge that Borden's of Arkansas, which the record shows supplied the milk, obtains the unprocessed milk for its local plant from Arkansas dairy farmers.

Looking to the legislative history of the Civil Rights Act for an indication regarding what the proponents of the bill intended by the use of the word "substantial" in § 2000a (c), we note that Robert F. Kennedy, who was then Attorney General, expressed the opinion in the hearings on S. 1732 before the Senate Committee on Commerce that the word "substantial" means "more than minimal." *Codogan v. Fox*, 266 F.Supp. 866, 868 (M.D. Fla. 1967). In *Newman v. Piggie Park Enterprises, Inc.*, 256 F.Supp. 941 (D. S.C. 1966), rev'd on other grounds, 377 F.2d 433 (4th Cir. 1967), cert. granted, 88 S.Ct. 87, the court held that where the evidence showed that at least 40% of the food moved in commerce, this was a "substantial" portion under a construction of the word in its usual and customary meaning, which the court defined as follows: "some-

thing of real worth and importance; of considerable value; valuable; something worthwhile as distinguished from something without value or merely nominal." In the *Newman* case, the district court held that the five drive-in restaurants belonging to Piggie Park Enterprises, Inc., all of which were located on or near interstate highways, were not covered by the Act because the evidence showed that less than 50% of the food was eaten on the premises, but the Fourth Circuit Court of Appeals reversed, holding that the test in construing this provision of the Act was not whether a principal portion of the food was actually consumed on the premises but whether the establishment was principally engaged in the business of selling food ready for consumption on the premises.

In *Willis v. Pickrick Restaurant*, 231 F.Supp. 396 (N.D. Ga. 1964), where the restaurant had annual gross receipts from its operations of over \$500,000.00 for the preceding year and its purchases of food exceeded \$250,000.00, the court found that a substantial part of this large amount of food originated from without the state and that, therefore, it affected commerce. Furthermore, while there was little evidence that it actually served interstate travelers, the evidence was clear that it offered to serve them by reason of the fact that it had large signs on two federal highways, and the restaurant itself was on the main business route of U. S. 41, a federal interstate highway.

In *Gregory v. Meyer*, 376 F.2d 509 (5th Cir. 1967), the court held that the question of the amount of food served in a restaurant which has moved in interstate commerce is a relative one and that the drive-in there involved, which had an annual sales of about \$71,000.00, of which approximately \$5,000.00 resulted from the sale of coffee and tea which had moved in interstate commerce, and which de-

rived two-thirds of its sales volume from beef products which came from a meat packer who purchased twenty to thirty per cent of his cattle from another state, was covered by the Act. Furthermore, the drive-in in the *Gregory* case was located only three blocks from a federal highway, on a street which was an extension of the highway, and the court found that it was engaged in offering to serve interstate travelers.

The case of *Katzenbach v. McClung*, 379 U.S. 294 (1964), is likewise distinguishable. The Supreme Court there stated at page 298: "In this case we consider its [the Act's] application to restaurants which serve food a substantial portion of which has moved in commerce." The restaurant there was located on a state highway, eleven blocks from an interstate highway, and evidence was introduced that 46% of the food served was meat which had been procured from outside the state.

The case of *Evans v. Laurel Links, Inc.*, 261 F.Supp. 474 (E.D. Va. 1966), cited by plaintiffs, is likewise factually inapposite. In the *Evans* case, it was stipulated that a portion of the food served moved in interstate commerce and that each year out-of-state teams participated in team matches; further, that the golf shop sold golf equipment, most of which was manufactured outside the state and had moved in interstate commerce. The court found that the lunch counters at Laurel Links served and offered to serve interstate travelers and also that the defendant customarily presented athletic teams which moved in commerce, thereby bringing it under subsection (b), paragraph (3) and subsection (c) of 42 U.S.C. § 2000a. The court there said at page 477: "The Act applies because an out-of-state team plays on the defendant's course on a regularly scheduled annual basis."

In the record before us, there is a total lack of proof that Lake Nixon Club served or offered to serve interstate travelers or that a substantial portion of the food which it served moved in interstate commerce. Therefore, all of the cases cited by the parties are distinguishable inasmuch as there is not a word of record testimony here that would justify a conclusion that the concession stand engaged in or offered to engage in any business affecting commerce. The same can be said with respect to the recreational facilities at Lake Nixon. There is not one shred of evidence that Lake Nixon customarily presented any activity or source of entertainment that moved in interstate commerce.

The evidence here is that Lake Nixon is a place for swimming and relaxing. While swimming is the principal activity, it does have fifteen aluminum paddle boats which are leased from an Oklahoma-based company and a few surf boards. It is common knowledge that annually thousands of this type boat are manufactured locally in Arkansas, and there is no evidence whatsoever that any of the equipment moved in interstate commerce. Furthermore, we do not interpret the law to be that coverage under the Act extends to businesses because they get a portion of their fixtures and/or equipment from another state. Otherwise, the businesses which the Act's sponsors and the Attorney General of the United States specifically said were not covered would be included in the coverage.⁶ There were two juke boxes obtained from a local amusement company which provided music upon the insertion of a coin. As hereinbefore stated, there usually would be a dance on Friday nights if the weather was good, and the

⁶ Senator Magnuson, floor manager of Title II, said that dance studios, bowling alleys and billiard parlors would be exempt. 110 Cong. Rec. 7406 (4/9/64); *Miller v. Amusement Enterprises, Inc.*, ... F.2d ... (5th Cir. 24259 9/6/67).

dances were sometimes advertised on a local radio station, apprising the members concerning the dance and inviting them to attend.

When the juke boxes were not utilized at the Friday night dances, a small band was provided but it was composed of local young amateurs and members of the Club, and there is no evidence whatsoever that they ever played outside Pulaski County. Such operations do not affect commerce under the definition of the statute which makes coverage applicable if the operation "customarily presents films, performances, athletic teams, exhibitions or other sources of entertainment which move in commerce." It was clearly not the intention of the Congress to include this type of recreation within the coverage of the Act, but, even if it should be construed as entertainment within the definition of the Act, it did not move in commerce and consequently is not proscribed.

The Civil Rights Act of 1964, as everyone knows, is a compromise act. It was not intended to be all inclusive, and, in this regard Senator Humphrey, a leading proponent of the bill, stated:

"The reach of that title [H.R. 7152] is much narrower than when the bill was first introduced. It is also narrower than S. 1732, the bill reported by the Senate Commerce Committee, which covers the general run of retail establishments. . . . The deletion of the coverage of retail establishments generally is illustrative of the moderate nature of this bill and of its intent to deal only with the problems which urgently require solution." 110 Cong. Rec. 6533.⁷

⁷ This extract is taken from the legislative history furnished the Fifth Circuit by the Civil Rights Division of the Department of Justice and attached to the opinion in *Miller v. Amusement Enterprises, Inc.*, *supra*.

Additionally, Senator Humphrey stated:

"Of course, there are discriminatory practices not reached by H. R. 7152, but it is to be expected and hoped that they will largely disappear as the result of voluntary action taken in the salutary atmosphere created by enactment of the bill." 110 Cong. Rec. 6567.⁸

Senator Magnuson, who was floor manager of Title II, discussed this title in detail and said:

"The types of establishments covered are clearly and explicitly described in the four numbered subparagraphs of section 201 (b). An establishment should have little difficulty in determining whether it falls in one of these categories. . . . Similarly, places of exhibition and entertainment may be expected to know whether customarily it (sic) presents sources of entertainment which move in commerce." 110 Cong. Rec. 6534.⁹

A section-by-section analysis of S. 1732 appears in 2 U. S. Cong. & Adm. News '64 at pages 2356 *et seq.* In a paragraph concerning subsection 3 (a) (2), it was stated:

"This subsection would include all public places of amusement or entertainment which customarily present motion pictures, performing groups, athletic teams, exhibitions, or other sources of entertainment which move in interstate commerce." (Emphasis added.)

We have no disagreement with the trial court's rationale or with its utilization of the rule of *ejusdem generis* in arriving at its conclusion, but our view is that subsection (c) of the statute so plainly defines the operations that affect commerce that it is obvious that Lake Nixon's ac-

⁸ See n. 7.

⁹ See n. 7.

tivities are not proscribed by the Act. Plaintiffs' argument that the Act applies is based on the false premise that a "substantial portion of the food sold has traveled through interstate commerce," which is wholly unsupported by the evidence. Treating this false assumption as a fact, plaintiffs then conclude that "the operation of the snack bar affects commerce within the meaning of § 201 (c) (2) of Title II."

In *Miller v. Amusement Enterprises, Inc.*, 422 F.2d 1000 (5th Cir. # 24259 9/6/67), the panel requested the United States, acting through its Civil Rights Division in the Department of Justice, to file with the court its brief setting forth the legislative history of these provisions insofar as pertinent. The response of the Civil Rights Division is attached to that opinion. The opinion by the three-judge panel in *Miller* was subsequently reversed by a divided court sitting en banc in an opinion handed down April 8, 1968. We cite the panel's slip opinion merely because it incorporates the Government's reference to the legislative history of the Act, a part of which we have heretofore referred to. The facts in the *Miller* case are patently distinguishable from those in the instant case. As examples, in *Miller* the amusement park was "located on a major artery of both intrastate and interstate transportation: . . . its advertisements solicit the business of the public generally" and were not confined to club members; and "ten of its eleven mechanical rides/admittedly were purchased from sources outside Louisiana."

What clearly distinguishes the case before us from other cases filed under this statute is the total lack of any evidence that the operations of Lake Nixon in any fashion affect commerce. There is no evidence that any interstate traveler ever patronized this facility, or that it offered to

serve interstate travelers, or that any portion of the food sold there moved in commerce, or that there were any exhibitions or other sources of entertainment which moved in or affected commerce.

The Congress by specifically and in plain language defining the criteria for coverage under subsection (c) precludes the court from holding upon any rule of construction that interstate commerce was affected absent requisite evidence establishing the criteria spelled out in the statute. There is no such evidence in this record.

We have read all the cases cited by the parties, as well as others, and our research has failed to disclose a single case where there was a complete absence of evidence, as there is in the instant case, to establish coverage under the Act.

The judgment of the district court is affirmed.

HEANEY, Circuit Judge, dissenting:

In my view, the judgment of the District Court cannot be upheld. It is based on an erroneous theory of the law and is not supported by the facts found by the court.

The court held that the Lake Nixon Club is not a covered establishment under the Civil Rights Act of 1964, §§ 201(b)(2) and (4), 42 U.S.C. 2000(b)(2) and (4)(1964), despite the fact that a lunch counter is operated on the premises, because the lunch counter is merely an adjunct to the business of making recreational facilities available to the public, and is not a separate establishment.

This conclusion is not supportable. Whether the lunch counter is an adjunct of or necessary to the operation of the Club is immaterial, as is the question of whether the

of the minority stated that "Section 201(d) precludes racial discrimination [of] a department store (operating a lunch counter)"

In *Drews*,⁶ *Evans*, *Adams* and *Scott*, the records indicate that the lunch counter and the recreation facility were owned by the same entity and operated as one coordinated facility.

The District Court relies on *Pinkney v. Meloy*, 241 F. Supp. 943 (N.D. Fla. 1965), to support its holding that a lunch counter must be a separate establishment (apparently separately owned) to evoke § 201(b)(4). There, the court held that a barber shop could not discriminate as it was located within a hotel, which was a covered establishment. The barber shop was separately owned, but that fact was not critical to the *Pinkney* decision. The legislative history of the Act gives as an example the precise fact situation involved in *Pinkney*:

"A hotel barber shop or beauty parlor would be an integral part of the hotel, *even though* operated by some independent person or entity [Emphasis added]."

The majority opinion of this Court does not base its decision on the rationale of the District Court that Lake Nixon is not a covered establishment within the meaning of §§ 201(b)(2) and (4). It relies instead on an alternative ground, namely, that even if it is otherwise covered, "There is a total lack of proof that Lake Nixon Club

⁵ Additional Views on H.R. 7152 of Hon. William M. McCulloch, Hon. John V. Lindsay, Hon. William T. Cahill, Hon. Garner E. Shriver, Hon. Clark MacGregor, Hon. Charles McC. Mathias; Hon. James E. Bromwell, 1964 U. S. Code Cong. & Ad. News, 2487, 2494.

⁶ *Drews v. State*, 324 Md. 186, 167 A.2d 341, 342 (1961).

⁷ Senate Report (Judiciary Committee) No. 872, 1964 U. S. Code Cong. & Ad. News, 2355, 2358-59.

served or offered to serve interstate travelers or that a substantial portion of the food served moved in interstate commerce." One of these elements must, of necessity, be established to bring the Club within the Act.⁸

⁸ It need not be established that the defendants' food "operations affect commerce" if the discriminatory practices by the defendants were "supported by state action." A state action theory of the case was not alleged nor argued.

The 1964 Civil Rights Act specifically defines "supported by state action:"

"§ 201 (d) Discrimination or segregation by an establishment is supported by State action within the meaning of this subchapter if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof."

An Arkansas statute purports to give an omnibus right to discriminate:

"§ 71-1801. *Right to select customers, patrons or clients.*—Every person, firm or corporation engaged in any public business, trade or profession of any kind whatsoever in the State of Arkansas, including, but not restricted to, * * * restaurants, dining room or lunch counters, * * *, or other places of entertainment and amusement, including public parks and swimming pools, * * *, is hereby authorized and empowered to choose or select the person or persons he or it desire to do business with, and is further authorized and empowered to refuse to sell to, wait upon or serve any person that the owner, manager or employee of such public place of business does not desire to sell to, wait upon or serve; * * *."

Arkansas Statutes Annotated, Vol. 6A (1967 Supp.).

The statute is further supported by criminal sanctions:

"§ 71-1803. *Failure to leave after request—Penalty.*—Any person who enters a public place of business in this State, or upon the premises thereof, and is requested or ordered to leave therefrom by the owner, manager, or any employee thereof, and, after having been so requested or ordered to leave, refuses so to do, shall be guilty of a trespass and upon conviction therefor shall be fined not more than five hundred dollars (\$500.00) or imprisoned in jail not more than six (6) months, or both such fine and imprisonment. [Acts 1959, No. 169, § 3, p. 1007.]"

Arkansas Statutes Annotated, Vol. 6A (1967 Supp.).

In view of the fact that I would reverse on other grounds, it is not necessary to express a view as to whether the plaintiff has made a prima facie case that the discrimination is supported by state action under § 201 (b)(1) by simply showing that the defendant discriminated and that the statute explicitly gave him that right. *Of. Adickes v. S. H. Kress & Company*, 253 F.Supp. 140 (S.D. N. Y. 1966). Furthermore, it is not necessary to express an opinion as to whether it is a defense to establish that the defendant would have discriminated regardless of the state statute. *Williams v. Hot Shoppes, Inc.*, 293 F.2d 835, 846-47 (D.C. Cir. 1961) (dissenting opinion), cert. denied, 370 U.S. 925 (1962).

lunch counter is operated as a separate establishment or as a part of a coordinated whole.

Mr. Chief Justice Warren, commenting on the effect of a food facility in an amusement park in *Drews v. Maryland*, 381 U.S. 421, 428, n.10 (1965),¹ stated:

"There is a restaurant at Gwynn Oak Park; indeed, petitioners were standing next to it when they were arrested. If a substantial portion of the food served in that restaurant has moved in interstate commerce,² the entire amusement park is a place of public accommodation under the Act. . . ."

In *Evans v. Laurel Links, Inc.*, 261 F.Supp. 474 (E.D. Va. 1966), the court found that a golf course was a public accommodation within the meaning of the Act because it had a lunch counter located on it. It did this even though the lunch counter accounted for only fifteen per cent of the gross receipts of the golf course. (Lunch counter receipts at Lake Nixon Club were approximately 22.8% of its gross income.)³ In *Evans*, the court said:

"The location of the lunch counter on the premises brings the entire golf course within the Act under 42 U.S.C. § 2000a(b)(4)(A)(ii) which provides that any

¹ For reasons hereinafter stated, it is my opinion that, in this case, commerce requirements were met by a showing that the Club served and offered to serve travelers in interstate commerce, thus I do not reach the issue of whether a substantial portion of the food moved in interstate commerce.

² The defendant and others refused to leave an amusement park and were convicted in a Maryland State Court of disorderly conduct and disturbance of the peace. After having previously remanded the case to the State Court of Appeals, the Supreme Court dismissed a subsequent appeal and refused to grant certiorari. Mr. Chief Justice Warren, joined by Mr. Justice Douglas, dissented and would have granted certiorari. In the course of discussing the legal issues involved, the Chief Justice noted that although the 1964 Civil Rights Act was passed after the occurrence of the conduct for which the defendants were prosecuted, the Act abated the pending convictions. *Hamm v. Rock Hill*, 379 U.S. 306 (1964). In the course of stating that view, he made the observations quoted above.

³ In 1966, the gross income from food sales was \$10,468.95, as compared with a total gross income of \$46,326.

establishment within the premises of which is located a covered establishment is a place of public accommodation. See H.R. Rep. No. 914, 88th Cong., 2d Sess. (1964) (additional Majority Views, Hon. Robert W. Kastenmeier) U.S. Code Cong. & Admin. News, pp. 2409, 2410. (1964); Rasor, Regulation of Public Accommodations Via the Commerce Clause—The Civil Rights Act of 1964, 19 Sw.L.J. 329, 331 (1965)."

Id. at 476.

In *Adams v. Fazio Real Estate Co., Inc.*, 268 F.Supp. 630 (E.D. La. 1967), the court held that the snack bar located on the premises of the bowling alley brought the entire facility under the Act. It stated:

"The statute contains no percentage test, and it is not necessary to show that the covered establishment which magnetizes the non-covered establishment in which it is physically located occupies a majority, or even a substantial part of the premises, or that its sales are major or even a substantial part of the revenues of the establishment. * * *"

Id. at 638 (footnote omitted).

In *Scott v. Young*, 12 Race Rel. L. Rep. 428 (E.D. Va. 1966), the parties consented to the entry of an order providing that as long as an eating establishment was operated on the premises of a recreational facility, the entire facility would be considered a public accommodation within the meaning of the 1964 Civil Rights Act, and that the defendant would be enjoined from denying the equal use of the facility to any person on the basis of race or color.

Furthermore, House Report 914 stated that the establishments covered under § 201(b)(4) "would include, for example, retail stores which contain public lunch counters otherwise covered by Title II;"⁴ and the additional views

⁴ House Report (Judiciary Committee) No. 914, 1964 U. S. Code Cong. & Ad. News, 2391, 2396.

As I read the District Court's decision, it avoided making a specific finding on whether the Club offered to serve interstate travelers. It did, however, state:

"It is probably true that some out-of-state people spending time in or around Little Rock have utilized [Lake Nixon Club facilities]."

This statement, in my view, constitutes a clear and specific finding that the Club served interstate travelers and was sufficient in and of itself to satisfy the interstate commerce requirement of the Act set forth in §201(c)(2)(b).⁹ Since this requirement is satisfied, the Club is covered.

While it is not necessary to find additional grounds to satisfy the commerce requirements of the Act, the record also supports the conclusion that the Club offered to serve travelers in interstate commerce: (1) the Club advertised on KALO radio on Wednesdays, Thursdays and Fridays from the last of May through the 7th of September;¹⁰

⁹ The conclusion of the District Court draws additional support from the following facts:

(1) The defendants made no attempts to specifically exclude interstate travelers:

(a) The membership card did not require that the applicant sign his address;

(b) The advertisements did not suggest that an interstate traveler could not become a member; and

(c) There is no sign posted at the entrance which restricted the membership only to Arkansas residents.

(2) Members brought guests.

(3) Lake Nixon appears to be only about six to eight miles by road from the only federal highway between Little Rock and Hot Springs.

10 The radio copy read as follows:

"Attention . . . all members of Lake Nixon. Attention all members of Lake Nixon. In answer to your requests, Mr. Paul is happy to announce the Saturday night dances will be continued . . . this Saturday night with music by the Villagers, a great band you all know and have asked to hear again. Lake Nixon continues their policy of offering you year-round entertainment. The Villagers play for the big dance Saturday night and, of course, there's the jam session Sunday afternoon . . . also swimming, boating, and miniature golf. That's Lake Nixon. . . ."

(2) it inserted one advertisement in "Little Rock Today," a monthly magazine, indicating available attractions in the Little Rock area in the same period; (3) it inserted one advertisement in the "Little Rock Air Force Base," a monthly newspaper published at the Little Rock Air Force Base, at Jacksonville, Arkansas.

It is clear, as pointed out in the majority opinion, that the advertisements were directed to "members." It is thus argued that interstate travelers would not consider the invitation as having been addressed to them. I cannot agree. The membership idea was clearly a ruse to keep Negroes from using the Club. It was obviously understood to be such by the people living in the Little Rock area, and there is little reason to doubt that nonresidents would be less sophisticated. It also appears, from the choice of media, that the message was intended to reach nonresidents as well as local citizens. No other sound reason can be advanced for using mass media to promote "entertainment" at a "private" club.

The District Court rationalized that the Club was not a place of exhibition or entertainment as § 201(b)(3) was not intended to cover facilities where people came to enjoy themselves by swimming, golfing, boating or picnicking. It reasoned that the Act was only intended to apply to a situation "where patrons came to be edified, entertained, thrilled or amused in their capacity of spectators or listeners." While it is unnecessary to reach this issue here, the majority opinion reaches it, and thus I feel obliged to.

I cannot concur with the majority: (1) It is difficult to conclude that the Club was not a place of entertainment when the defendants characterized it in those terms in their radio advertisements: "Lake Nixon continues their policy of offering you year-round entertainment." Foot-

note 10, *supra*. See also, *Miller v. Amusement Enterprises, Inc.*, Civ. No. 24259 (5th Cir. April 8, 1968) (*en banc*), reversing 259 F.Supp. 523 (E.D. La. 1966). (2) It is equally difficult to conclude that the operation of the Club did not affect commerce within the meaning of § 201(c)(3), for the District Court specifically found that the juke boxes, which furnished music for dancing or listening, were manufactured outside of Arkansas, that some of the records played on them were manufactured outside of Arkansas, and that part of the other recreational equipment and apparatus (aluminum paddle boats and "Yaks"—surfboards) were brought into Arkansas from without the state. The fact that the aluminum paddle boats and the "Yaks" (surfboards) could have been manufactured in Arkansas is, in my judgment, not material when the District Court found and the record shows that they were leased and purchased¹¹ from an Oklahoma concern and imported into Arkansas.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

¹¹ It appears from the record that the "Yaks" were purchased rather than leased:

"Q. Do you have any other kind of boats there?

"A. We have what we call a yak.

"Q. A yak; what's a yak?

"A. Its similar to a surfboard.

"Q. Similar to a surfboard; do you know where you purchased that?

"A. From the same company.

"Q. What company is that?

"A. Aqua Boat Company.

"Q. Who?

"A. Aqua Boat Company.

"Q. Is that a local Company?

"A. No.

"Q. Where is it?

"A. I believe they're in Oklahoma, Bartlesville."

Judgment**United States Court of Appeals
For the Eighth Circuit.**

No. 18,824. September Term, 1967.

Doris Daniel and Rosslyn
Kyles,

Appellants,

vs.

Euell Paull, Jr., Individu-
ally and as Owner, Manager
or Operator of the Lake
Nixon Club.Appeal from the
United States
District Court
for the Eastern
District of
Arkansas.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Arkansas, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Judgment of the said District Court, in this cause, be, and the same is hereby, affirmed, in accordance with majority opinion of this Court this day filed herein.

May 3, 1968.

Order Denying Rehearing

United States Court of Appeals
For the Eighth Circuit

No. 18,824.

Doris Daniel, et al.,)

Appellants,)

vs.)

Euell Paul, Jr., etc.)

) Appeal from the
) United States Dis-
) trict Court for the
) Eastern District
) of Arkansas.

There is before the Court appellants' petition for rehearing en banc and on consideration of such petition, It is the Order of the Court that the petition for rehearing en banc be, and it is hereby, denied.

June 10, 1968
